In the High Court of Uttaranchal, at Nainital.

Chapter VIII, Rule 32 (2) (b)
Description of Case.

Criminal Jail Appeal No. 1834 of 2001

Nand Kishore @ Nand Lal ..Vs… State.

Date of decision: 11th March, 2005

For the approval of :

Hon'ble Mr. Justice Irshad Hussain, J.

Hon'ble Mr. Justice Rajesh Tandon, J.

- Whether the order/judgment should be Sent for reporters for reporting? (Yes)

- Whether the reporters be allowed to See the judgment? (Yes)

ISB

In the High Court of Uttaranchal, at Nainital.
Criminal Jail Appeal No. 1834/2001

Nand Kishore @ Nand Lal Dheemare

S/o Shesh Raj Dheemare

R/o Village Chomala, Konali Anchal,

Nepal ……. Appellant.

Vs.

State …… Respondent.

Sri Pankaj Purohit, learned Amicus Curiae for the appellant.
Sri H.C. Pandey, leaned A.G.A.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble Rajesh Tandon, J.

Dated: March 11th , 2005.

Per: Hon'ble Mr. Justice Irshad Hussain.

This appeal is filed against the judgment dated 25-9-2001 passed by Additional Sessions Judge, Rudraprayag in Sessions Trial No. 29/2001. The appellant was convicted and sentenced to Rigorous Imprisonment for life and fine of Rs. 2000/- under Section 302 I.P.C. for having committed to murder of market Chaukidar Padam Bahadur at about 3.45 A.M. on 27.6.2001 in the main market of the town of Rudraprayag.

2- Briefly stated the facts of the case are that on 27-6-2001 at about 3.45 A.M. constable Naveen Bijalwan (P.W.4) along with Home Guards Gajpal (P.W.3) and Kuldeep Lal were returning to the Police Station, Rudraprayag from their picket duty and when they reached near Hunuman Temple in the main market of Rudraprayag, they saw a man having a dagger (Khukhari) in his hand standing in front of hotel Neelkamal and at that place another man lying on the ground was writhing in pain. These security personnel at once reached that place and found that the man lying on the ground had breathed his last. The dead person was identified as the market chaukidar Padam Bahadur son of Dhan Singh Nepali. The man, who was standing there with dagger wanted to make his escape possible from there, but was arrested by these security personnel. On query he disclosed his name

as Nand Lal Dheemare @ Nand Kishore son of late Shesh Raj Dheemare resident of Chomala in Nepal and he was presently employed as a servant in New Sandeep Hotel in Rudraprayag. The dagger possessed by him had blood stains on its blade. The leather cover of the dagger was found attached to a belt found tied around his abdomen. These articles were then attached by these security personnel at the spot and were packed and sealed in a packet and the man was told that he had been arrested in connection with an offence of murder punishable under Section 302 I.P.C. A memo of arrest and seizure, Ext.Ka.4 was also prepared at the spot by constable Naveen Bijalwan and a copy of the same was given to the arrested culprit. Home Guard Gajpal was left at the scene of the incident to take care of the dead body of the victim and the arrested culprit was then taken to the Police Station along with the attached articles . On the basis of the memo, check F.I.R. was got prepared at the police station at 4.30 A.M. the same day, that is, 27.6.2001.

3- A case was thus registered against the arrested culprit, the accused of the case, and the investigation of the case was taken up by Station Officer R.P. Singh (P.W.7). He left the police station for the scene of the incident and on reaching there held inquest on the dead body of deceased Padam Bahadur and prepared inquest report, Ext. Ka.3. The dead body was packed and sealed and was dispatched for post mortem along with the relevant documents of the inquest and challan report. The autopsy on the dead body was conducted by Dr. Mayank Upadhyaya (P.W.6) of District Hospital Gopeshwar. The clothes of the deceased and attached dagger etc were sent for chemical examination and on completion of the usual formalities of the investigation, the charge sheet, Ext.Ka.15 was submitted against the accused-appellant on 4-7-2001.

4- At the trial, prosecution examined seven witnesses to prove the charge levelled against the accused. P.W.1, constable Rajendra Prasad Dimari was posted as Constable Clerk P.S. Rudraprayag on 27-6-2001. He proved that the check F.I.R. (Ext. Ka.1) submitted by him on the basis of the memo of arrest and seizure of dagger, prepared by constable Naveen Bijalwan, who took the accused- appellant to the police station along with recovered articles at 4.30 P.M. on 27-6-2001.

He also proved the copy of the G.D. Report of registration of the case (Ext. Ka.2). P.W.2, Prem Singh is the witness of the inquest and he formally proved the inquest report (Ext. Ka.3) prepared by the Station Officer, P.S. Rudraprayag. P.W.3, Home Guard Gajpal and P.W.4, Constable Naveen Bijalwan supported the prosecution version as narrated above with reference to the case set up against the accused. They have arrested the accused from near the scene of the incident where the dead body of the deceased Padam Bahadur was found lying with injuries and further that the accused was then carrying a blood-stained dagger and its leather cover hanging by the belt tied around his abdomen. P.W.5, Prem Bahadur, a relation of the deceased, gave out that the accused had once threatened to kill the deceased as he was displeased on account of a beating given by the deceased when the accused wanted to commit theft in a temple.

5- P.W.6, Dr. Mayank Upadhyaya performed post mortem on the dead body of deceased Padam Bahadur at 4.30 P.M. on 27.6.2001 and prepared the post mortem report, Ext. Ka.7. At that time the rigor mortis was found present all over the body and following ante-mortem injuries were then detected on the dead body:-

(1) An incised wound 15cm x 3cm x bone deep, starting 2.5 cm above middle of left eyebrow, going backwards and downwards to left side of head, then cutting through left ear.

(2) Incised wound 8cm x ½ cm x bone deep, starting 2.5cm below middle of right lower eyelid, going to left cutting through the nose. Wound is 4cm deep.

(3) A V shaped incised wound with tip of V to the left side of chin. Upper limp 3.5 cm x ½ cm x soft tissue deep. Lower limb 4cm x ½ cm x soft tissue deep.

(4) Incised wound 8cm x 4cm x heart and liver deep, vertically placed on left side front side of chest cutting through left 6^{th}, 7^{th} and 8^{th} ribs.

(5) An incised wound 5cm x 1.5cm x muscle deep present, vertically to back just to left of mid line between scapulae.

(6) An incised wound 6.5cm x 3cm x rib deep present left side and back of chest , 8cm from mid line.

(7) An incised wound 6cm x ½ cm x soft tissue deep present on left hip.

On internal examination left lung and heart were found incised and there was blood in peritoneal cavity.

In the opinion of the Medical Officer the cause of death was shock and haemorrhage resulting from ante-mortem injuries and the death was probably caused at about 3.45 A.M. on 27-6-2001. He also gave out that the ante-mortem injuries could be sustained by blows of the Khukhari. In the cross examination he ruled out the possibility of sustaining the injury no.4 by a fall if the deceased was carrying a Khukhari. He also stated that ante-mortem injury nos. 1,2 and 3 could not be sustained by a fall on stones having pointed edges.

6- P.W.7, Sri R.P. Singh , Station Officer, Rudraprayag proved the steps taken towards the investigation of the case including holding of inquest on the dead body. He also seized sample of blood-stained and the plain earth from the scene of the incident, vide memo, Ext. Ka.9, and on completion of the investigation submitted charge sheep against the accused-appellant. He refuted the suggestion that the accused appellant was innocent and he was arrested to suppress the agitation of the people and also to improve the image of the police force.

7- Accused appellant denied the accusations of the prosecution and urged that he was arrested while he was returning after attending to natural call and that he was not carrying any Khukhari with him. No evidence was adduced in defence.

8- Learned Sessions Judge made an analytical appreciation of the circumstances appearing against the accused appellant and believed that the circumstances of appellant’s arrest from near the dead body of the deceased and that too when the appellant was found carrying a Khukhari stained with blood make out a complete chain to prove that none other than the accused-appellant had committed the murder of the victim of the case. The learned Sessions Judge accordingly held the appellant guilty and convicted and sentenced him as aforesaid.

9- We have heard the learned counsel for the parties and have gone through the evidence on record and have also carefully perused the judgment under appeal.

10- The case of the prosecution rest entirely on circumstantial evidence and the learned trial court found that the circumstances highlighted by the prosecution evidence were sufficient to fasten guilt on the appellant. The circumstances relied upon were as under:-

(1) The appellant Nand Kishore @ Nand Lal was arrested soon after the murder of Padam Bahadur near his dead body.

(2) That the appellant was then carrying a Khukhari with blood-stains on its blade.

(3) That the leather cover of the Khukhari was hanging on the belt tied around the abdomen of the appellant at the time of his arrest.

(4) That the ante-mortem injuries of the deceased according to the medical evidence correspond to sharp edged weapon such as Khukhari.

(5) That the chemical examiner reported that blood-stains were on the Khukhari attached from the appellant.

11- At the outset it need to be stated that it is well settled that where a case rest squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. As stated above in the opinion of the learned Sessions Judge the above circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the murder of Padam Bahadur was committed by the appellant and none else.

12- Learned Amicus Curiae appearing for the appellant submitted that in regard to the first circumstance it need to be seen that the evidence of P.W.3, Home Guard Gajpal and P.W.3, Constable Naveen Bijalwan, the two witnesses of the fact, make it highly doubtful that the appellant could have been arrested by them from near the dead body of the deceased lying on the ground in front of hotel Neelkamal. To bring home his point of view he drew attention to the site-plan Ext.Ka.10 of the place of the occurrence and submitted that the point ‘A’ is the place where the security personnel, including the said two witnesses, were coming towards main bazaar and the point ‘X’ is the place where the appellant Nana Kishore @ Nand Lal was allegedly

standing at that time and the distance between these two points being fifteen meters as shown in the site plan by the Investigating Officer, it was highly improbable that the appellant would remain there standing near the dead body even noticing the presence of the security personnel and instead of running away from there would facilitate his arrest at that spot. In the site plan the place of the arrest of the appellant has been shown by point ‘Z’ and the distance between the points ‘X’ and ‘Z’ has been mentioned as four meters. Referring to this the learned Amicus Curiae argued that it is also not probable that the appellant would be able to run only four meters in order to make his escape possible from the scene of the incident and during that period the security personnel would be able to cover a distance of about nineteen meters to arrest the appellant. If it is taken that the distance has been correctly given in the site plan, even then the distance of nineteen meters for these witnesses to cover up to arrest the appellant can not be said to be too much, particularly when the witnesses suspected foul play and ran towards the appellant to apprehend him while making an attempt to run away from there. Merely on account of this distance the otherwise reliable and cogent evidence of both these witnesses who have stood the test of cross-examination and stood firm on their claim that the appellant was arrested by them from near the dead body of the deceased cannot be viewed with suspicion. From the statement of these witnesses no infirmity as may tell upon their credibility could be pointed out by the learned Amicus Curiae and in the totality of the circumstances of the case we find ourselves in agreement with the view of the learned Sessions Judge that the first circumstance that the appellant was arrested from near the dead body of Padam Bahadur lying in front of hotel Neelkamal, stand established.

13- The second circumstance referred above also stand established by the evidence of both these witnesses who have been firm in their assertion that at the time of the arrest the appellant was having Khukhari in his hand, which was then attached at the spot itself and memo of arrest and seizure of Khukhari, Ext. Ka.4 was prepared. Learned Amicus Curiae submitted that absence of any independent public witness create suspicion in the claim of the prosecution and the

evidence of these witnesses and therefore it would not be safe to accept the claim that the Khukhari was possessed by the appellant at the time of the arrest. We see no substance in this argument also because the appellant was arrested in the odd hours of the night at about 3.45 A.M. and at the time no public witness was present near about the scene of the incident. The bus stand of the main bazaar, as has been shown in the site plan, is not far-off from the scene of the occurrence but it is of significance that P.W.3 and P.W.4 clearly gave out that the passengers normally start coming to the bus stand after 4 A.M. when the barrier for entry of the vehicles is removed. Considering this aspect of the matter we see no reason to disbelieve the evidence of the witnesses that no public witness was then present near the scene of the occurrence and the arrest of the appellant was effected by the security personnel alone and at that time the appellant was found carrying of a Khukhari in his hand.

14- In regard to the third circumstances, it is of significance that Khukhari is a sharp edged instrument, which is normally kept in a leather cover to avoid any injury to the person carrying it with him. It is in the evidence of P.W.3 and P.W.4 that at the time of the arrest the appellant had a belt tied around his abdomen and the leather cover of the Khukhari was attached to the belt. This shows that the appellant used to keep Khukhari in his possession and this was the reason that its leather cover was duly found tied around his abdomen to the belt. This article was also attached at the spot vide memo, Ext. Ka.4 and the presence of the leather cover in the belt found tied around the abdomen rule out the possibility of planting the naked Khukhari on the person of the appellant. In connection with this recovery also nothing incriminating against prosecution version could be extracted from the cross-examination of the P.W.3 and P.W.4 and in the face of the evidence on record it was fully established that the appellant was then carrying with him sharp edged Khukhari with its leather cover hanging to the belt.

15- Post mortem on the dead body of deceased Padam Bahadur was conducted by P.W.6, Dr. Mayank Upadhyaya and number of incised wounds were detected on the person of the deceased. The medical evidence has been referred above and the injuries sustained on the

person of the deceased were proved to be ante-mortem. The Medical Officer gave definite opinion that the injuries were probably caused by sharp edged weapon such as Khukhari at about 3.45 A.M. on 27-6-2001 and on cross-examination he ruled out the fatal injuries having been sustained by fall on the stones having pointed edges and further when the victim would have a fall on the ground by his head while carrying a Khukhari with him. There is nothing in the cross examination which may assail the claim of the Medical Officer that the injuries were probably caused by Khukhari. The medical evidence thus sufficiently establish the factum of sustaining the injuries by the deceased by sharp edged weapon such as Khukhari and the fourth circumstance also stand sufficiently established.

16- So far as the fifth circumstance is concerned the chemical examiner reported that the blood stains were on the blade of the Khukhari but their origin could not be ascertained as the stains got disintegrated. The expert's report, Ext.Ka.8 was tendered in evidence and although it was not established that the blood was of human origin but presence of the blood on the blade of the Khukhari was affirmed on chemical examination. Therefore, as argued by the learned Additional Government Advocate, the learned Sessions Judge was not fully unjustified in holding that the circumstance pertaining to presence of the blood is also link in the chain of the circumstances pointing to the guilt of the appellant. It is also evidence that the above five circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that the murder of Padam Bahadur was committed by the appellant and none else.

17- In the face of the facts of the case the absence of proof of motive to commit the murder of Padam Bahadur by the appellant will not make any difference, particularly when it has not been shown that the deceased was a man of immoral character and had number of enemies. It is not one of those cases in which the culprit is arrested later on away from the scene of incident and that being so the arrest of the appellant with weapon of assault from near the dead body of the deceased soon after the homicidal death of the victim make out such a strong chain of circumstances that absence of proof of motive will not effect the credibility of the prosecution version and its evidence as

discussed above. We have made this observation in view of the fact that the evidence of P.W.5, Prem Bahadur is hearsay in regard to the motive for the appellant to commit the murder of the deceased.

18- Learned Sessions Judge also took note of the fact that the plea of alibi taken by the appellant in his statement under Section 313 of the Code of Criminal Procedure is not reliable and it can not be accepted that the appellant was picked up by the police while he was returning after attending to natural call in the early hours in the morning of 27-6-2001. Learned Amicus Curiae submitted that failure to establish defence plea of alibi can not be taken to be a circumstance against the appellant and in support of his argument he place reliance on a decision of the Apex Court in the matter of Sakharam versus State of Madhya Pradesh; AIR 1992 Supreme Court 758. It need to be stated that the learned Sessions Judge has not taken the failure of defence of alibi as a circumstance against the appellant but made a reference of his defence claim while analyzing the evidence on record in context to the statement of the appellant under Section 313 of the Code of Criminal Procedure. The judgment of guilt of the appellant was based on other circumstances referred above and also considered by us an on the basis of failure of defence of alibi no inference had been drawn against the appellant. Therefore this argument of the learned Amicus Curkae also does not help the cause of the appellant.

19- Having regard to the above discussion and the circumstances found established against the appellant we are of the firm view that the learned Sessions Judge has rightly held the appellant Nand Kishore @ Nand Lal guilty of committing the murder of Padam Bahadur. The conviction and sentence awarded to the appellant therefore need to be affirmed and the appeal is liable to be dismissed.

20- The appeal is dismissed. The judgment and order dated 25-9-2001 passed by the learned Additional Sessions Judge, Rudraprayag convicting the appellant Nand Kishore @ Nand Lal Dheemare under Section 302 I.P.C. and sentencing him to undergo Rigorous Imprisonment for life and to pay a fine of Rs. 2000/- (two thousands) and in default of payment of fine to further undergo one

year’s R.I., is hereby affirmed. The appellant is in jail. He shall suffer the sentence passed against him.

21- Let the record be sent back to the court concerned for compliance.

(Rajesh Tandon, J.) **(Irshad Hussain, J.)**

ISB